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In the Supreme Court of the United States

OCTOBER TERM, 1940

No. 990

THE UNITED STATES, PETITIONER
v.
NUNNALLY INVESTMENT COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

The Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the judgment of the Court of Claims entered in the above-entitled cause on January 27, 1941.

OPINION BELOW

The opinion of the court below (R. 20–32) is reported in 36 F. Supp. 332.

JURISDICTION

The judgment of the Court of Claims was entered January 27, 1941. (R. 32.) The jurisdiction of this Court is invoked under Section 3 (b) of the Act of February 13, 1925, as amended by the Act of May 22, 1939.

QUESTION PRESENTED

In 1929 the taxpayer obtained a judgment in the District Court against the Collector of Internal Revenue, awarding it a refund of income taxes for the year 1920. May it thereafter bring another suit in the Court of Claims to obtain an additional refund of income taxes for the same year?

STATUTES INVOLVED

Revised Statutes.

> SEC. 989. When a recovery is had in any suit or proceeding against a collector or other officer of the revenue for any act done by him, or for the recovery of any money exacted by or paid to him and by him paid into the Treasury, in the performance of his official duty, and the court certifies that there was probable cause for the act done by the collector or other officer, or that he acted under the directions of the Secretary of the Treasury, or other proper officer of the Government, no execution shall issue against such collector or other officer, but the amount so recovered shall, upon final judgment, be provided for and paid out of the proper appropriation from the Treasury. (U. S. C., Title 28, Sec. 842.)

Revenue Act of 1926, c. 27, 44 Stat. 9:

> SEC. 1128.
>
> * * * * *
>
> (b) Section 3210 of the Revised Statutes, as amended, is reenacted without change, as follows:

"SEC. 3210. (a) Except as provided in subdivision (b) the gross amount of all taxes and revenues received under the provisions of this Act, and collections of whatever nature received or collected by authority of any internal-revenue law, shall be paid daily into the Treasury of the United States under instructions of the Secretary of the Treasury as internal-revenue collections, by the officer receiving or collecting the same, without any abatement or deduction on account of salary, compensation, fees, costs, charges, expenses, or claims of any description. A certificate of such payment, stating the name of the depositor and the specific account on which the deposit was made, signed by the treasurer, assistant treasurer, designated depositary, or proper officer of a deposit bank, shall be transmitted to the Commissioner of Internal Revenue.

* * * * *

(U. S. C., Title 26, Sec. 1761.)

STATEMENT

The special findings of fact of the Court of Claims (R. 13–19) may be summarized as follows:

The respondent is a Delaware corporation, the successor, since 1935, of a Georgia corporation of the same name. The Georgia corporation, formerly the Nunnally Company, is hereinafter referred to as the taxpayer. (R. 13.)

On January 2, 1920, the taxpayer sold all its business and assets to the Nunnally Company of Delaware for $3,000,000 cash and the assumption

of certain of the taxpayer's liabilities, including federal taxes for the years 1917, 1918 and 1919. These taxes amounted to $209,958.91, of which $170,219.41 was paid by the purchaser in the year 1920, and the remainder of $39,739.50 was paid in 1921 and 1922. (R. 14.)

Taxpayer filed an income tax return for the year 1920, reporting a net profit of $379,384.22 from the sale of its assets, but showing no tax liability as a result of certain offsetting items. (R. 14–15.) Thereafter the Commissioner of Internal Revenue determined a deficiency for the year 1920 in the amount of $493,817.95. In determining the deficiency the Commissioner employed a lower basis in computing gain upon sale of the taxpayer's assets, and he used $3,209,958.91 as the sales price, representing the cash consideration of $3,000,000 plus $209,985.91 of the taxpayer's tax liability for earlier years which the vendee discharged. The profit on sale was thus computed to be $1,637,467.80. (R. 8–11, 15.)

The additional tax assessed, together with interest of $16,113.34 making a total amount of $509,-931.29, was demanded of the taxpayer by the Collector of Internal Revenue for the District of Georgia, and was paid to the Collector on September 21, 1926. (R. 15.)

On April 22, 1927, the taxpayer filed with the Collector a claim for refund for the full amount of taxes and interest paid alleging that the Com-

missioner's statement of income was erroneous by reason of his understatement of the basis of the assets sold. No other ground for refund was stated in the claim. More than six months after the filing of the claim, the taxpayer filed suit against the Collector in the United States District Court for the Northern District of Georgia, denying that any of the taxes assessed against it were due and raising no issue except the basis for determining profit of the assets sold on January 2, 1920. (R. 15.)

The case was tried on stipulations and oral testimony directed to the issue of the basis of the assets sold. The jury rendered a special verdict determining the value as of March 1, 1913, of the entire business and property of the Nunnally Company and of certain leases. Thereafter the Collector filed a motion for a new trial. (R. 16.)

Upon order of the court, the parties submitted computations of the amount of the judgment to be based on the verdict, the taxpayer submitting two computations and the Collector one. In all of these computations the sales price used was the same, i. e., $3,209,958.91, but there was a divergence in other figures making a difference in the computations of the amount of the overpayment of tax and interest. (R. 16–17.)

In the light of the dispute between the parties as to the proper valuation of the assets and of the defendant's [the Collector's] motion for a new trial, the parties on June 27, 1929, entered into the

following stipulation for judgment and no appeal (R. 17–18):

> Subject to the approval of the Attorney General of the United States, to be acted upon within thirty days from this date, it is hereby stipulated by and between the plaintiff, by its attorneys, Clifford L. Anderson, Granger Hansell, and H. Brand, and defendant, by C. P. Goree, Assistant U. S. Attorney, and Elden MacFarland, Special Attorney, Bureau of Internal Revenue, that judgment be entered in the above-stated cause in favor of the plaintiff and against the defendant in the principal sum of Two Hundred and Fifty Thousand ($250,000.00) Dollars, together with interest on said sum from September 21, 1926, according to law, together with lawful costs of court.
>
> Said judgment having been entered, it is stipulated that neither side shall appeal therefrom.
>
> It is further stipulated that if the Attorney General does not take favorable action on this stipulation within the period of thirty days, as above set out, the stipulation shall be of no force and effect and the parties shall be restored to the same status which they occupied before the stipulation was entered into.

On the basis of this stipulation for judgment, judgment was entered on July 6, 1929, for $250,000 and interest and costs of suit, and a certificate of probable cause was granted. Thereafter a certificate of overassessment was issued to the taxpayer

and the total amount of $295,265.33 shown thereon was paid to it on or about September 29, 1929. (R. 18.)

Thereafter, on September 13, 1930, the taxpayer filed a claim for refund of $200,000 income and profits taxes for 1920. It sought refund on the ground that the sales price of the assets should not have been as high as $3,209,958.91, because some of the taxpayer's pre-1920 taxes which the vendee paid and which were included in that purchase price, were in fact not paid until 1921 and 1922 and therefore could be income to the taxpayer only in the latter years rather than in 1920. The claim also sought refund on other grounds that were later abandoned. (R. 18–19.)

Upon rejection of this claim, suit was instituted in the Court of Claims on March 18, 1933.

The Court of Claims gave judgment for the taxpayer holding that the taxes assumed by the purchaser, but not paid until after 1920, did not constitute taxable income to the respondent in 1920; and that the judgment against the Collector in the District Court was not *res judicata* in this suit against the United States. Judge Whitaker dissented. (R. 20, 26.)

SPECIFICATION OF ERROR TO BE URGED

The Court of Claims erred in permitting a suit against the United States to recover taxes for the year 1920 notwithstanding a prior judgment against a Collector of Internal Revenue with respect to the same tax for the same year.

REASONS FOR GRANTING THE WRIT

In 1929 the taxpayer obtained a judgment in the District Court against the Collector of Internal Revenue in the amount of $295,265.33, as a refund of income taxes for the year 1920. Thereafter, it instituted this suit against the United States in the Court of Claims seeking an additional refund for the same tax year. In permitting the taxpayer to maintain this suit, the decision of the court below deals with a question of great importance in federal tax litigation and is in conflict with principles established by this Court.

1. If the earlier suit had been against the United States, rather than against the Collector, there can be no doubt that the present suit would not be maintainable, whether the result be couched in terms of *res judicata* or estoppel by judgment. The contrary result of the court below turns solely upon the fact that the earlier suit here was against the Collector and rests upon *Sage* v. *United States,* 250 U. S. 33, where a suit against a Collector was described as "personal" in nature.[1]

[1] The discussion in the *Sage* opinion as to the nature of the suit against the Collector has been regarded as dictum, since the result in that case was supportable by certain specific legislation dealing with the particular legacy taxes there involved. See *Second Nat. Bank of Saginaw* v. *Woodworth*, 54 F. (2d) 672, 673 (E. D. Mich.); *Cudahy Packing Co.* v. *Harrison*, 18 F. Supp. 250, 254 (N. D. Ill.), appeal dismissed, 102 F. (2d) 981 (C. C. A. 7th); *Sage* v. *United States*, *supra*, at p. 38. See also Griswold, *Res Judicata in Federal Tax Cases*, 46 Yale L. J. 1320, 1341–1342.

However, whatever basis there may have been for the *Sage* decision was removed by this Court's subsequent decision in *Moore Ice Cream Co.* v. *Rose,* 289 U. S. 373. The latter case involved the provisions of the Revenue Act of 1926 which dispensed with the necessity of payment under protest as a condition to suits for refund of taxes. It was argued that it was unconstitutional to eliminate that condition as to suits against the Collector since such suits were "personal" in nature and that there would be absence of due process to deprive the Collector of such rights, particularly as to taxes already paid before enactment of the new provisions. This Court, however, in sustaining the provisions, pointed out that a suit against the Collector was in reality a suit against the Government (pp. 382–383):

> A suit against a Collector who has collected a tax in the fulfilment of a ministerial duty is today an anomalous relic of bygone modes of thought. He is not suable as a trespasser, nor is he to pay out of his own purse. He is made a defendant because the statute has said for many years that such a remedy shall exist, though he has been guilty of no wrong, and though another is to pay. * * * There may have been utility in such procedural devices in days when the Government was not suable as freely as now. * * * They have little utility today, at all events where the complaint against the officer shows upon its face that in the proc-

> ess of collecting he was acting in the line of duty, and that in the line of duty he has turned the money over. In such circumstances his presence as a defendant is merely a remedial expedient for bringing the Government into court.

In holding that the present suit is maintainable since the earlier suit against the Collector was "personal", the decision of the court below is in direct conflict with the principles thus laid down in the *Moore Ice Cream Co.* decision. Cf. *Sunshine Coal Co.* v. *Adkins,* 310 U. S. 381, 401–404;[2] *Anniston Mfg. Co.* v. *Davis,* 301 U. S. 337.

Moreover, some of the lower federal courts as well as commentators have regarded the *Sage* case as inconsistent with the *Moore Ice Cream Co.* decision or have otherwise sharply criticized the result. See *Western Maryland Ry. Co.* v. *United States,* 23 F. Supp. 554, 558–560 (D. Md.); *Second Nat. Bank of Saginaw* v. *Woodworth,* 66 F. (2d)

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[2] Although it is true that the *Sage* case was cited in the *Sunshine Coal* opinion as well as in *Tait* v. *Western Md. Ry. Co.*, 289 U. S. 620, nevertheless neither of those cases turned upon the "personal" nature of the action against the Collector. Prior to the *Moore Ice Cream Co.* decision the *Sage* case had been applied in *Bankers Coal Co.* v. *Burnet*, 287 U. S. 308. But the question in the *Bankers Coal* case did not involve splitting a single cause of action or relitigating the identical tax liability; in that case the question was whether an issue litigated as to earlier years in a suit against a collector could be litigated as to *later* years in another proceeding. Although the distinction there drawn in reliance upon the *Sage* case is perhaps undesirable, the question is nevertheless different from the one here involved.

170, 171 (C. C. A. 6th); Griswold, *Res Judicata in Federal Tax Cases,* 46 Yale L. J. 1320, 1342–1343; Paul, *Selected Studies in Federal Taxation* (Second Series), p. 125.

In view of the probable conflict in principle with the *Moore Ice Cream Co.* decision and in view of the uncertainty as to the present scope of the *Sage* decision, it is highly important to the orderly conduct of the Government's tax litigation that the question be authoritatively settled by this Court.

2. But even if a suit against a Collector may be said to be "personal" in some circumstances, it certainly was not such in this case. The Collector in the suit in the District Court was clearly acting as an agent of the Government and not in his personal capacity. The tax sought to be recovered was collected by him in accordance with the instructions of his superior officer, the Commissioner of Internal Revenue. He was under an immediate duty to pay such amount into the Treasury of the United States,[3] he was represented in the suit by the District Attorney, and the final settlement was subject to the approval of the Attorney General. In such circumstances, he was entitled to a certificate of probable cause as a matter of right[4] and it was not in the discretionary power of the District Judge to deny its issuance.

In *Sunshine Coal Co.* v. *Adkins,* 310 U. S. 381, this Court recently held that where the issue in

[3] Revised Statutes, Section 3210, *supra.*

[4] Revised Statutes, Section 989, *supra.*

separate suits is the same, the fact that the parties are not precisely identical is not necessarily fatal. It was pointed out in that case that there is privity between officers of the Government and that the crucial point is whether or not in the earlier litigation the representative of the United States had authority to represent its interest in a final adjudication of the issue in controversy. It therefore held that a judgment in a suit against the Bituminous Coal Commission was *res judicata* in a later suit against a Collector.

The decision of the court below is thus in conflict in principle with the decision in the *Sunshine Coal Co.* case.

3. The decision below is in conflict with the well established principle that a single cause of action may not be split. In *Stark* v. *Starr,* 94 U. S. 477, this Court pointed out that a litigant (p. 485):

> is not at liberty to split up his demand and prosecute it by piecemeal, or present only a portion of the grounds upon which special relief is sought, and leave the rest to be presented in a second suit, if the first fail. There would be no end to litigation if such a practice were permissible. * * *

See also *United States* v. *California & Ore. Land Co.,* 192 U. S. 355, 358. And the claim that the taxes for a single year have been overpaid constitutes a single cause of action. *International Curtis Marine Turbine Co.* v. *United States,* 56 F. (2d) 708 (C. Cls.); *American Woolen Co.* v. *United*

States, 18 F. Supp. 783 (C. Cls.), certiorari denied, 304 U. S. 581; cf. *Guettel* v. *United States,* 95 F. (2d) 229 (C. C. A. 8th), certiorari denied, 305 U. S. 603. The suit against the Collector drew in question every item which entered into the computation of the tax. *Lewis* v. *Reynolds,* 284 U. S. 281, 599.

A taxpayer may sue either the Collector or the United States, but he may not recover from both. While it is true that a taxpayer has two remedies, it must be evident that they are alternative remedies and not cumulative remedies. Once an election has been made and a judgment secured, the tax liability for that year is fixed and determined. The amount of the recovery due the taxpayer is likewise fixed and determined, and we submit there is no right to institute another action to recover an additional amount.

The rule for which we contend has been specifically enacted into law with respect to Board of Tax Appeals cases. Once the Board has determined the amount of tax, it is provided by Section 284 (d) of the Revenue Act of 1926 that, with certain exceptions, "* * * no credit or refund in respect of the tax for the taxable year in respect of which the Commissioner has determined the deficiency shall be allowed or made and no suit by the taxpayer for the recovery of any part of such tax shall be instituted in any court * * *." Thus a final decision by the Board of Tax Appeals ends all litigation with respect to the tax liability for the partic-

ular year involved. We think that this statute is merely a recognition of the rule generally followed that a single cause of action may not be the subject of more than one suit. In any event, no distinction should be made between taxpayers who litigate in the Board of Tax Appeals and those who sue in the courts. In each case the taxpayer has a single cause of action for any one year and the fact that he has alternative remedies should not be made the excuse for multiple suits. Cf. Government's petition for certiorari in *United States* v. *Kales,* No. 826, 1940 Term.

CONCLUSION

It is therefore respectfully requested that this petition for a writ of certiorari should be granted.

CHARLES FAHY,
Acting Solicitor General.

APRIL 1941.

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SUPREME COURT OF THE UNITED STATES.

October Term, 1940.

No. 990.

THE UNITED STATES,

Petitioner,

v.

NUNNALLY INVESTMENT COMPANY.

On Petition for a Writ of Certiorari to the Court of Claims.

BRIEF FOR THE RESPONDENT IN OPPOSITION.

Granger Hansell,
W. A. Sutherland,
Atlanta, Georgia,
Counsel for Respondent.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1940.

No. 990.

THE UNITED STATES,

PETITIONER,

v.

NUNNALLY INVESTMENT COMPANY.

On Petition for a Writ of Certiorari to the Court of Claims.

BRIEF FOR THE RESPONDENT IN OPPOSITION.

OPINION BELOW.

The opinion of the court below (R. 31-45) is reported in 36 F. Supp. 332.

QUESTION PRESENTED.

Where a taxpayer has recovered judgment against a collector of internal revenue for an overpayment of income and profits taxes and later brings suit in the Court of Claims for a further refund of tax for the same year on a new ground, which is determined to be meritorious, is the Court precluded from rendering judgment against the United States by reason of the former suit and judgment against the collector?

STATEMENT.

The special findings of fact by the Court of Claims are summarized at some length in the petition. Briefly stated, the material facts are these: Respondent had brought suit in a district court against a Collector of Internal Revenue for an overpayment of income tax for 1920 and recovered a judgment which was paid by the United States. Thereafter respondent filed a claim for a further refund of 1920 taxes on a ground not previously raised and, on rejection of the claim, brought suit against the United States in the Court of Claims. That Court held the new claim meritorious and rendered judgment for respondent, over the Government's contention that the previous suit and judgment against the collector were a bar to the proceeding against the United States.

In the petition here the Government does not question the lower court's holding on the merits. Nowhere in the petition is there any denial that the Government had collected from respondent and is retaining excessive taxes in the amount of the judgment. The petition attacks the decision below solely on the technical ground that judgment against the United States was precluded by the previous judgment against a Collector of Internal Revenue.

In stating the reasons why the writ should be granted, the petitioner thus summarizes its contentions (Pet. p. 11):

> "In view of the probable conflict in principle with the *Moore Ice Cream Co.* decision and in view of the uncertainty as to the present scope of the *Sage* decision, it is highly important to the orderly conduct of the Government's tax litigation that the question be authoritatively settled by this Court."

We shall discuss *first*, the claim that the scope of the *Sage* decision is uncertain, and *second*, the claim of probable conflict with the *Moore Ice Cream Co.* decision, referring in appropriate places in the discussion to subsidiary contentions of petitioner.

ARGUMENT.

I. No Question as to the Scope of the Sage Case Is Presented.

There is no uncertainty as to the scope of the *Sage* decision. In that case, it appeared that a taxpayer had obtained a partial recovery of tax in an action against a Collector of Internal Revenue, and later brought suit against the United States in the Court of Claims for the balance of the tax collection. This Court sustained a recovery in the second suit, holding in an opinion by Mr. Justice Holmes that the first suit was against the Collector personally, and that therefore the judgment therein was not res judicata in the later suit against the United States. Such also was the precise holding of the Court of Claims, which the Government is attacking in the present case. There can be no doubt whatever as to the applicability of the *Sage* case in the present situation.

If there were room for question as to the scope of the *Sage* decision or as to any of the implications which have been drawn from the *Sage* case, in other and distinguishable situations, the present case would furnish no occasion for a consideration of such implications. Since the *Sage* case and the case at bar present *identical situations*, this Court would have no opportunity here to limit or define the scope of the *Sage* case. This ground of certiorari, therefore, is clearly untenable.

As a matter of fact, in connection with the procedural aspects of suits against Collectors, the principle of the *Sage* case has never been questioned in this court by the solicitor general, and the reaffirmances by this Court of the procedural principles of the case have resulted principally from the Government's—not the taxpayer's—reliance upon it.

In *Smietanka v. Indiana Steel Co.*, 257 U. S. 1, the Court,

again speaking through Mr. Justice Holmes, refused to permit a suit for recovery of taxes against the successor in office of the Collector to whom they were paid. The Solicitor General had relied upon the *Sage* case for the proposition that the suit against the Collector is "personal," and on the authority of that case the Court sustained his contention. Cf. *Union Trust Co. v. Wardell*, 258 U. S. 537.

The Solicitor General next relied upon the *Sage* case in *Bankers Coal Co. v. Burnet*, 287 U. S. 308, for the proposition that a particular issue tried out for an earlier year in a suit against a Collector is not *res judicata* in a later year in a suit against the Commissioner. The Court sustained his contention, holding the *Sage* case applicable.[1] The *Bankers Coal Co.* case represents a full affirmation of the doctrine of the *Sage* case.

Also in the case of *Tait v. Western Maryland Ry. Co.*, 289 U. S. 620, it was the Solicitor General who relied on the *Sage* case in attempting to prevent the application of *res judicata*. In that case the Court fully recognized the authority of the *Sage* case, but held it inapplicable where the first suit was against the Commissioner or the United States and the second suit was against the Collector.

A factual situation similar to that existing in *Tait v. Western Maryland Ry. Co.* was presented in the case of

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[1] There are two branches of the doctrine of *res judicata*, as the Government suggests in footnote 2 on page 10 of its petition; but this affords no basis whatever for the attempted distinction of the *Bankers Coal Co.* case from the *Sage* case and the decision below. The Court did not suggest, in the *Bankers Coal Co.* case, that the earlier decision on the identical issue was inapplicable because it related to a different taxable year. On the contrary, relying squarely on the *Sage* case, the Court rested its decision on the ground that the United States is not a party to a suit against a Collector. Both branches of the rule of *res judicata* are exactly the same so far as the requirements of party identity is concerned. If the United States had been a party to each of the suits in the *Bankers Coal Co.* case, there is no doubt that *res judicata* would have applied.

Sunshine Anthracite Coal Co. v. Adkins, 310 U. S. 381. The Court recognized the same distinction between that case and the *Sage* case which had already been pointed out in *Tait v. Western Maryland Ry. Co.* The *Sunshine Anthracite* case added nothing of importance here to *Tait v. Western Maryland Ry. Co.,* and it expressly affirmed the principle of the *Sage* case.[2] The petitioner's suggestion, therefore, that there is any conflict between the case at bar and the *Sunshine Anthracite* case is entirely without merit.

Even in cases where the Government has sought to avoid the *constitutional,* as distinguished from the *merely procedural,* implications of the *Sage* case, and has contended that retroactive restrictions on refund actions were justified on the basis of sovereign immunity to suit, even in the case of suits against Collectors, it has admitted the scope and authority of the decision in the *Sage* case and related cases in relation to procedure and *res judicata.* See, for example, the briefs in: *Graham v. Goodcell,* 282 U. S. 409, and *Anniston Mfg. Co. v. Davis,* 301 U. S. 337.[3]

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[2] Mr. Justice Douglas made the following statement in this connection (p. 403):

> "Cases holding that a judgment in a suit against a collector for unlawful exaction is not a bar to a subsequent suit by or against the Commissioner or the United States (Sage v. United States, 250 U. S. 33; Bankers Pocahontas Coal Co. v. Burnet, 287 U. S. 308) are not in point, since the suit against the Collector is 'personal and its incidents, such as the nature of the defenses open and the allowance of interest, are different.' Sage v. United States, supra."

[3] In the brief for respondent in *Graham v. Goodcell,* No. 36, Oct. Term, 1930, the Solicitor General said (p. 34):

> "Nor does the fact that the instant case involves a suit against the collector of internal revenue rather than against the United States lead to a different conclusion. Actions against a collector are personal in the sense that they may not be prosecuted against his successor in office and judgments therein are not *res judicata* in suits against the United States. *Smietanka*

It is absurd to suggest that the holding of the Court in the *Sage* case as to the "personal" character of a suit against a Collector was mere *dictum.*[4] That principle

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v. Indiana Steel Co., 257 U. S. 1; *Sage v. United States*, 250 U. S. 33."

The Solicitor General, in the brief for the respondent in *Anniston Mfg. Co. v. Davis*, No. 667, Oct. Term, 1936, stated (pp. 40-41):

> "Petitioner, in his attempt in effect to secure reversal of this line of authority, relies on several decisions of this Court which emphasize that the action against the Collector has the procedural consequences of a suit against an individual rather than one against the Government. *We do not, of course, question the soundness of these decisions; if Congress chooses to extend a remedy in the form of a personal action, it must be taken to have intended that the ordinary procedural incidents of such an action would be operative.* Thus, in *Patten v. Brady*, 184 U. S. 608, 612-615, this Court held that after the death of the Collector the suit could be revived against his executrix. Correlatively, it held in *Smietanka v. Indiana Steel Co.*, 257 U. S. 1 (followed in *Union Trust Co. v. Wardell*, 258 U. S. 537, 542), that the action could not be brought against the Collector's successor in office. In *Sage v. United States*, 250 U. S. 33, 37, a judgment against the Collector was held to be no bar to suit against the United States for recovery of the balance of the taxes overpaid. In *Bankers Pocahontas Coal Co. v. Burnet*, 287 U. S. 308, 312, it was held that a judgment against the Collector was not *res judicata* against the United States." (Emphasis supplied.)

[4] Petitioner does not assume responsibility for the *dictum* charge, but simply points out in footnote 1 on page 8 of its petition that the discussion of the personal nature of the action in the *Sage* case "has been *regarded* as *dictum*" by two District Judges and a law review writer. None of them attempts any open analysis or study of the case. The law review writer blindly accepts the *dictum* charge from one of the District Judges, and both Judges rely on the following language used by Mr. Justice Holmes in the *Sage* case:

> "But *perhaps* it would be enough to say that if the judgment otherwise were a bar, the bar would be removed by the subsequent enactment of the Act of July 27, 1912, Chap. 256, 37 Stat. at L. 240, upon which, as well as the Act of 1902, this claim is based." (Emphasis supplied.)

They all entirely ignore the use of the word *"perhaps,"* and ignore the fact that this statement was made only *after* a thorough analysis of the nature and incidents of suits against Collectors *and after* the decision is rested unequivocally on the ground that *res adjudicata* does not apply on account of the difference in parties.

was the basis of the decision in the *Sage* case and has always been so regarded by this Court, and by the Solicitor General as well.

On page 11 of the petition it is contended that, even though some suits against Collectors may be "personal," the action here was not, because here the Collector acted under an assessment by the Commissioner. There is nothing new in this situation. The same circumstance existed with respect to the tax involved in the *Bankers Coal Co.* case, as was evident from the record.[5] This fact, therefore, affords no basis whatever for distinguishing the present case from the *Sage* and *Bankers Coal Co.* cases.

On page 12 of the petition it is urged that the decision below is in conflict with the "well-established principle that a single cause of action may not be split." It is submitted, however, that the principle relied on can apply only where the parties are the same in both suits. The rule against splitting a cause of action is but a part of the doctrine of *res judicata.* Where the parties are different, as was the case here, the rule against splitting causes, or estoppel by judgment, or *res judicata,* does not apply.[6] The *Sage* case itself is clear authority for this position, since the same act of tax collection and the same tax liability was involved in both suits there. *The very same quotation from Stark v. Starr,* 94 U. S. 477, 485, *quoted and relied upon by the Government here, was quoted and relied upon by the Government near the beginning of its brief in the Sage case.*

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[5] See findings of Board of Tax Appeals, 18 B. T. A. 901, 907. If the same fact was not present in the *Sage* case, certainly no point was made of its absence.

[6] See Clark, Code Pleading (1928), pp. 318-324. In all of the cases on splitting of causes of action cited by petitioner, the parties to the two suits were identical, except in the case of *American Woolen Co. v. United States,* 18 F. Supp. 783 (C. Cls.), where the first suit was against the Commissioner of Internal Revenue *in his official capacity,* and, of course, barred a subsequent suit against the United States on ordinary principles of *res judicata.*

When the taxpayer in the *Bankers Coal Co.* case, supra, attempted to reargue again the proposition which the Government had argued unsuccessfully in the *Sage* case—that the United States, for purposes of *res judicata,* should be treated as privy to the judgment in the suit against the Collector—the Solicitor General thus summarily disposed of his contention:

> "We believe that the petitioners' argument that the Commissioner is privy to the suit against the collector is fully answered by what this Court said in the *Sage case, supra,* which the court below accepted as controlling upon this question."[7]

The same answer should be made to the Government's effort now to have this Court reconsider anew principles which were again reaffirmed in the *Bankers Coal Co.* case, and which have never been questioned in any subsequent decision of this Court.

II. The Holding in the Sage Case and in the Case at Bar in No Way Conflicts With the Decision in the George Moore Ice Cream Co. Case.

The *Moore Ice Cream Co.* case did not mention the *Sage* case nor purport to disturb the holding of that case, and it cannot be construed to have that effect.

The mere propinquity in time of the decision in the *Moore Ice Cream Co.* case (decided on May 8, 1933) to the decisions in the cases of *Bankers Coal Co. v. Burnet,* 287 U. S. 308 (decided on December 5, 1932), and *Tait v. Western Maryland Ry. Co.,* 289 U. S. 620 (decided on May 29, 1933, and argued in the very week when the *Moore Ice Cream Co.* case was decided), should be sufficient to dispel any idea that the *Moore Ice Cream Co.* case was intended to decide anything inconsistent with the *Sage* case and the

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[7] *Bankers Coal Co. v. Burnet,* No. 104, Oct. Term, 1932, respondent's brief, p. 20.

Bankers Coal Co. case, which expressly reaffirms and follows the *Sage* case. All of these decisions were by a unanimous court; and the *Moore* case involved no question of *res judicata,* while the other two cases definitely involved that principle.

Mr. Justice Stone, in the *Bankers Coal Co.* case, relying upon and affirming the holding of the *Sage* case that a judgment against a Collector is not *res adjudicata* in a suit against the United States, said (p. 311):

> "With respect to this contention (the assertion by the *taxpayer* of res judicata) it is sufficient to say that the suit in the District Court was not against the Commissioner of Internal Revenue, the respondent here, but against the Collector, judgment against whom is not res judicata against the Commissioner or the United States (*Graham and Foster v. Goodcell,* 282 U. S. 409, 430; *Sage v. United States,* 250 U. S. 33; see *Smietanka v. Indiana Steel Co.,* 257 U. S. 1; compare *Union Trust Co. v. Wardell,* 258 U. S. 537)."

Mr. Justice Roberts, in *Tait v. Western Maryland Ry. Co.,* while distinguishing that case from the *Sage* case on the ground that in that case the former suit was against the Commissioner and the second suit was against the Collector, expressly recognized the holding and authority of the *Sage* and the *Bankers Pocahontas Coal* cases where the former suit is against the Collector and the second suit against the Commissioner or the United States, stating (p. 627):

> "In a suit for unlawful exaction the liability of a collector is not official but personal. *Sage v. United States,* 250 U. S. 33; *Smietanka v. Indiana Steel Co.,* 257 U. S. 1; *Graham and Foster v. Goodcell,* 282 U. S. 409, 430. And for this reason a judgment in a suit to which he was a party does not conclude the Commissioner or the United States. *Bankers Pocahontas Coal Co. v. Burnet,* 287 U. S. 308, 311 * * *."

In view of the foregoing, the Government's suggestion that the Court intended, by the *George Moore Ice Cream Co.* decision, to abandon in any respect the ground of its decision in the *Sage* case, expressly followed in the *Bankers Coal Co.* case and approved in *Tait v. Western Maryland Ry. Co.*, would seem to attribute to the Court a dismal lack of understanding of the significance of its holdings.

The decision in the *Moore Ice Cream Co.* case is, of course, in no way inconsistent with the *Sage* case or *Bankers Coal Co.* case. Those cases involved questions of *res judicata*, while the *Moore Ice Cream Co.* case involved a question of the power of Congress under the Constitution—the question whether the statute abolishing the technical requirement of protest deprived the Collector of property without due process of law if applied in a suit against a Collector to recover taxes collected before the statute was enacted. The Court reached the conclusion that there was no practical danger that thus to apply the statute would work any hardship on the Collector, since from a practical standpoint he was certain of reimbursement from the Government, and that therefore the removal retroactively of the technical requirement of protest did not deprive him of property without due process of law. As the Court said, he was just as certain to be compensated as a person whose land the Government seizes is certain ultimately to be compensated for it. There was, therefore, no practical danger of injury. That is all that was necessary to uphold the constitutionality of the statute.

In reaching the decision which the Court reached, Mr. Justice Cardozo used language—such as that quoted in the petition, pp. 9-10—about the character of suits against collectors, which standing alone might tend to indicate that a suit against the collector and a suit against the United States are one and the same thing. But certainly, in the light of the entirely different question there involved, such

language does not require that we assume that the Court intended to abandon doctrines so recently affirmed.

Surely neither Mr. Justice Stone nor Mr. Justice Roberts, who wrote the opinions in the *Bankers Coal Co.* case and *Tait v. Western Maryland Ry. Co.*—the former decided a few months before and the latter three weeks after the decision of this Court in the *Moore Ice Cream Co.* case—would have concurred in the decision in the *Moore Ice Cream Co.* case if they had interpreted it as conflicting with their decisions; nor would Mr. Justice Cardozo have concurred in their decisions had he considered that such a conflict existed.

Nor could the Chief Justice's concurrence in the *Moore Ice Cream Co.* case be explained if the petitioner's interpretation of the decision were accepted; since the Chief Justice just two terms earlier had written the opinion of the unanimous court in the case of *Graham v. Goodcell*, 282 U. S. 409. It there appeared that Congress had imposed a retroactive restriction on certain refunds. Some taxpayers sued collectors and others sued the United States, asserting that the statute violated the Fifth Amendment. The Solicitor General urged that the statute could be supported as an assertion of sovereign immunity without regard to the due process provisions. Rejecting that contention and relying squarely upon the holding in the *Sage* case that the suit against the Collector is personal, the Chief Justice said (p. 430):

> "The argument of the government in this respect (that is, the claim of sovereign immunity to suit) is not adequate to dispose of the controversy. Some of the present suits were brought against the *collector individually* and were based upon *the right to recover as against him by reason of his illegal acts. Such an action is personal, and not against the United States.* Sage v. United States, 250 U. S. 33, 37; Smietanka v.

> Indiana Steel Co., 257 U. S. 1, 4, 5. If the Congress did not have the authority to deal by a curative statute with the taxpayers' asserted substantive right, in the circumstances described, it could not be concluded that the Congress could accomplish the same result by denying to the taxpayers *all* remedy *both* as against the United States and also as against the one who committed the wrong." (Emphasis supplied.)[8]

The last case in which this Court was called on to consider the constitutional implications of the *Sage* case was *Anniston Mfg. Co. v. Davis*, relied on in the petition here (p. 10). In that case the Circuit Court of Appeals, relying on an erroneous interpretation of the *Moore Ice Cream Co.* case, had held that the suit against the Collector could be disposed of on principles of sovereign immunity since the suit against the Collector was just a means of bringing the Government into court. This Court rejected that contention and sustained the statute in question only on the ground that the statute substituted a fair and adequate remedy against the Government, which met the requirement of due process of law. The Court said:

> "The judgment of dismissal is affirmed, *but* upon the grounds stated in this opinion." (Emphasis supplied.)

It seems quite unreasonable, therefore, for the petitioner to suggest that the Anniston case furnishes any support whatever for his contention that the *Moore Ice Cream Co.* case in any way reflects upon the decision in the *Sage* case.

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[8] During the oral argument in *Graham v. Goodcell*, the Assistant Attorney General argued that Congress could invoke the doctrine of sovereign immunity to bar a suit against a Collector just as if it were a suit against the United States. Mr. Justice Holmes emphatically replied from the Bench that such an argument was contrary to the fundamental principles on which our Government was founded. It was certainly clear that Mr. Justice Holmes recognized the *Sage* case as standing not only for the procedural rule relied on here, but also for the deeper implications involved in *Graham v. Goodcell*.

The *Graham* and *Anniston* cases clearly demonstrate that there are real differences in substance, as well as procedural differences, between a suit against a Collector and a suit against the United States. The only confusion which has arisen in connection with the subject is in the minds of two authors largely relied upon by the Government in its brief in the court below, and cited here.[9]

III. If Any Change Should Be Made in the Rule of the Sage Case, It Should Be Made by Congress.

For more than twenty years the holding of the *Sage* case that suit against a Collector does not bar a subsequent suit against the United States for taxes not recovered in the first suit has not been questioned even by the Solicitor General—much less by this Court—until the present petition was filed. If the principle there laid down is to be disturbed after more than twenty years of reaffirmation by

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[9] Paul, Studies in Federal Taxation, 2d Series, pp. 124-126, and Griswold, Res Judicata in Federal Tax Cases, 46 Yale L. J. 1320. Both of these authors, disliking the decisions in the *Sage* and the *Bankers Coal Co.* cases and not appreciating the substantial bases of these decisions, grasp at phrases in Mr. Justice Cardozo's opinion in the *Moore Ice Cream Co.* case to support their wishful thinking that this Court has prepared to abandon the *Sage* case and the cases following it. In reaching this erroneous conclusion they completely misunderstand the holding in such cases as *Graham v. Goodcell* and *Anniston Mfg. Co. v. Davis.*

Griswold (op. cit. p. 1342) and Paul (op. cit. p. 126) cited the decision of the Circuit Court of Appeals in the *Anniston* case, 87 F. (2d) 773, as supporting a plea of sovereign immunity in suits against Collectors, and they add to their citation: "affd. 301 U. S. 337"; but they fail to explain that this Court's opinion is utterly inconsistent with any claim of sovereign immunity. Griswold even cites *Graham v. Goodcell* as sustaining the defense of sovereign immunity in a suit against a Collector, whereas the holding in that case is definitely and expressly to the contrary.

The only court decision which lends any support to the contention of petitioner is the decision in *Western Maryland Ry. Co. v. United States*, 23 F. Supp. 554 (D. C. D. Md.), which relies largely upon the erroneous assumptions in Griswold's article.

this Court, it should certainly be by legislation, and not by any effort to have this Court overrule a line of unanimous decisions of such long standing.

There is no question as to the power of Congress, if it wishes to do so, to prevent a suit against the United States where a prior suit has been prosecuted against a Collector. But if Congress should see fit to alter the present situation with reference to the effect of suits against a Collector—where multiple collections by different Collectors may be involved, and where substantial rights may be affected by changes which might appear to have only procedural importance, and where the presently existing right of trial by jury may be threatened—just what changes Congress would adopt are entirely problematical.[10]

For this Court, with only the narrowest section of a large and important field before it, to undertake to disturb well-settled rules from which many and important implications flow, would certainly present dangers and difficulties which no necessities in the present situation require the Court to incur. Since the rule followed by the court below has been settled law for at least twenty-one years, no great hardship or confusion is likely to result from leaving it undisturbed until Congress chooses to act.

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[10] When a related question was presented to Congress in connection with appeals to the Board of Tax Appeals, it adopted what is, in effect, a principle of *election of remedies* rather than the principle of *res judicata*. Section 284 (d) of the Revenue Act of 1926 does *not* provide, as the Government suggests (Petition pp. 13-14), that a *final decision* of the Board of Tax Appeals is required to bar recourse by the taxpayer to other remedies, but clearly provides that whenever a *timely appeal* to the Board of Tax Appeals has been *filed*, all remedies other than the prosecution of that appeal are from that moment forever barred to the taxpayer; and the same statute [Section 273 (f)] eliminates the right of the Commissioner to make additional assessments except in accordance with the decision of the Board.

CONCLUSION.

It is therefore respectfully submitted that the petition should be denied.

GRANGER HANSELL,
W. A. SUTHERLAND,
Counsel for Respondent.